



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Lorenzo Construction Company, Inc.

File: B-224211

Date: October 27, 1986

DIGEST

1. Cancellation of invitation for bids after bid opening for lack of sufficient funds is proper. Since statutory limitations prohibit the award of a contract when funds are not available, the contract could not be awarded to the protester and then terminated in part, since that would have required an obligation of funds in excess of the funds available.

2. Protest against continuation of procurement by negotiation following proper cancellation of invitation for bids after bid opening is without merit where requirement was urgent and both bidders under invitation were afforded an equal and reasonable opportunity to compete for requirement under oral request for proposals.

DECISION

Lorenzo Construction Company, Inc., protests the United States Army Corps of Engineers' cancellation after bid opening of invitation for bids (IFB) No. DACA21-86-B-0080 for the construction of a barracks complex at Fort Bragg, North Carolina, and the resolicitation of reduced requirements under request for proposals (RFP) No. DACA21-86-R-0625. We deny the protest.

Lorenzo was the low bidder under the IFB, with a base bid of \$13,840,000; ACS Construction Company was the only other competitor. Both bids exceeded the government's estimate of the cost of the project and the available funds, both slightly less than \$12.5 million. The Corps, in its report on the protest, states that after initial efforts to obtain added funding failed, both bidders were advised by telephone that the IFB would be canceled and that the procurement might be continued as an RFP with some reductions in the scope of the project.

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On September 12, 1986, the Corps issued an amendment canceling the IFB and changing the acquisition to a negotiated one. On the same day, both bidders were advised that the Corps would seek additional funding and to disregard the amendment. On September 17, however, the Corps again decided to negotiate a reduced scope to the contract, and notified Lorenzo and ACS by telephone that negotiations would be held on Friday, September 19.

The Corps states that on September 18, Lorenzo said that it would be unable to meet for negotiations on September 19, and requested another date; negotiations with Lorenzo therefore were held on Monday, September 22. During negotiations, both offerors were apprised of the reductions and changes in the requirements. The Corps conducted negotiations with Lorenzo using notes from its negotiations with ACS and, in fact, provided a copy of those notes to Lorenzo to assure that both offerors received the same information. The Corps states that both offerors were advised at the close of their negotiations that a best and final offer would be due on September 23. ACS submitted the low offer.

Meanwhile, on September 17, Lorenzo filed a protest with the Corps objecting to the cancellation of the IFB and contesting any negotiations with ACS. In its protest to our Office, filed on September 25, Lorenzo contends that its bid price was, in fact, reasonable, and asserts that if the Corps wanted to reduce the scope of the procurement to stay within its funding limitations, it could have made the award to Lorenzo and then terminated portions of the contract. Lorenzo also contends that the confusion and lack of timely notification regarding the cancellation of the IFB and initiation of negotiations did not provide Lorenzo with adequate time to prepare a proposal, and that the negotiations were not conducted on an equal basis. Finally, Lorenzo asserts that the Corps did not advise it during the September 22 negotiations that the offers to be submitted on September 23 were to be best and final offers.

We find these contentions to be without merit. Generally, an IFB may not be canceled after bids have been opened and prices revealed, unless there is a compelling reason for the cancellation. Federal Acquisition Regulation, 48 C.F.R. § 14.404-1(a)(1) (1985). An agency's determination that adequate funds are not available for a procurement is a sufficient reason to cancel an IFB after bid opening. Military Base Management, Inc., B-216309, Dec. 4, 1984, 84-2 C.P.D. ¶ 619. Since the Corps thus had a sufficient basis for cancellation, we need not consider the question of the

reasonableness of Lorenzo's prices. Tektronix, Inc., B-219981.4, June 12, 1986, 86-1 C.P.D. ¶ 545. Moreover, since statutory limitations prohibit the award of a contract when funds are not available, id., the Corps could not make an award to Lorenzo and then delete parts of the contracts--that would have required an obligation of funds in excess of the funds the agency had. Consequently, we find nothing improper in the Corps' cancellation of the IFB.

As to the subsequent use of negotiated procurement procedures, in Hoyer Construction Co., Inc., B-216825, Feb. 13, 1985, 85-1 C.P.D. ¶ 194, we considered a protest against cancellation of an IFB after bid opening in which, much like the present case, the agency elected to continue the procurement through an oral request for proposals with very little time for submission of proposals. In that case, we sanctioned the agency's use of oral negotiations because of the urgency of the requirement and because both bidders under the IFB were afforded an opportunity to compete under the RFP.

We think the rationale of Hoyer Construction Co., Inc., is equally applicable here. First, the Corps determined that this requirement was urgent; Lorenzo has not contested this determination. Second, although there was some confusion attending the Corps' ultimate determination to conduct oral negotiations, both bidders were apprised of the determination at the same time and were offered the opportunity to conduct negotiations on the same date, and steps were taken to assure that each offeror received the same information. The fact that negotiations were conducted with Lorenzo 3 days later than they were with ACS is attributable to Lorenzo's apparent inability to meet with the Corps on the offered date, rather than to some factor under the control of the Corps.

Finally, in the absence of evidence to support Lorenzo's allegation that it was not advised to submit a best and final offer, we are constrained to accept the Corps' assertion that the agency advised both offerors that the offers due on September 23 were to be best and final ones. Indeed, given Lorenzo's knowledge that the Corps was working under a significant time limitation, and since there obviously were no technical matters left to be discussed after the September 22 session, we think it should have been obvious to Lorenzo that the selection decision would be based on its September 23 response.

In short, we find nothing improper in the cancellation of the IFB, and we believe the Corps acted reasonably to assure both offerors a fair and equitable opportunity to compete under

the RFP. In these circumstances, we find no basis for objection to the Corps' actions.

The protest is denied.

for Seymour Efron
Harry R. Van Cleve
General Counsel